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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 340

ANTHONY R. FERNICOLA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER IN SUPPORT

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REPLY BRIEF FOR THE PETITIONER IN SUPPORT

Petitioner submits the following argument in reply to the Brief for the United States in Opposition.

1. Whether the Evidence Was Sufficient to Support the Verdict

As stated in *Smith* v. *United States*, 348 U.S. 147, 155 (1954), "Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the government"

cannot "succeed." *Holland* v. *United States,* 348 U.S. 131, 135 (1954), cited as authority for that proposition, states that when the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt.

Herein petitioner relied upon the existence of *inter vivos* gifts from his father, substantial cash brought to him by his marriage (some allowance based thereon being allowed by the Government) and the receipt by him on the death of his father of an approximate $81,000.00 cash hoard. On the record, the Government asserts that it has sufficiently carried the burden of establishing a reasonably accurate opening net worth, relying basically upon petitioner's total net earnings during the pre-indictment period in question.

In this connection, it must be noted that, after several years of (away from home) intensive education leading to a medical degree (the cost of which was paid from some source), petitioner opened his professional office in or about August of 1950. *At that time,* he purchased an automobile for *cash* ($2,000.00) and for *cash* ($11,022.68) purchased office furniture and fixtures. No explanation is offered by the Government as to the source of these expenditures and obviously, on the record made by the Government, the source of such expenditures could not have been taxable income. In 1953, after the death of his father, petitioner purchased for *cash* ($2,250.00) a new Oldsmobile and made a *cash* contribution of $500.00 to the American Legion Hospital. In 1954, petitioner made a political contribution in *cash* in the amount of ~~$100.00~~ $1,000.00 and in March of that year made a $10,000.00 *cash* gift

to the St. James Church. All of this was done by an individual who the Government asserts on January 1, 1951 and January 1, 1952 had no cash on hand and who on January 1, 1953 and January 1, 1954 is asserted to have had on hand no more cash than the respective amounts of $2,750.00 and $1,860.25.

Must it not here be said, therefore, that the very demonstrated lack of earnings prior to 1955, taken in light of heavy expenditures for away-from-home education, automobiles, office furniture and fixtures, and political and charitable contributions, aggregating a most substantial figure, points unmistakably to the fact that defendant did have a source of nontaxable funds and in a substantial amount which has not been directly refuted?

Further, on the record, must it not be said that the existence of such fund has not been indirectly refuted, as in *Holland,* by any showing of financial hardships suffered during its alleged existence? Still further, must it not be said that the Government, contrary to the situation in *Holland,* introduced no evidence to show that petitioner's business during the years involved was capable of producing more income than was reported?

It is submitted that in light of the record herein upon which the conviction was based, clarification of the guidelines set out in the *Holland* case is required.

2. Whether the Prosecutor Improperly Commented on the Failure of the Petitioner and His Wife to Testify

On four occasions, the Assistant United States Attorney, referring to the $10,000.00 cash donation from the defendant to St. James Church, and in his attempt

to negate the existence of "cash on hand," commented upon the defendant's failure to testify as follows:

"* * * *Who says* the money came from Dr. Fernicola's resources? (438a)

"* * * The only evidence we received was the evidence of a receipt of $10,000 turned over by [sic] the church to [sic] Dr. Fernicola. (439a)

"* * * and in referring to some of these documents *who says* that the $10,000 came from funds of Dr. Fernicola? Referring to Dr. Fernicola's 1954 income tax return, *he didn't say so* * * *. (439a)

"*Who says* the money came from Dr. Fernicola's own resources, *not Dr. Fernicola.* Well, if that $10,000 didn't come out of the pocket of Dr. Fernicola, where did it come from? And in that regard I want to call attention to the receipt, printed right at the bottom of it, 'contributions deductible for income tax purposes,' and they are and should be, *but Dr. Fernicola doesn't say so.* (440a)

"Where did that $10,000 come from? * * * (440a)

* * *

"This was a family affair * * *. (441a)

* * *

"The money was turned over by the doctor. The receipt goes to the doctor. The letter goes to the doctor. This is the St. James Centennial Fund letter, and the first memorial for $10,000, Dr. Anthony Fernicola. (442a)

* * *

"Why wouldn't the members of his family allow him, starting out in life, to make the contribution to achieve whatever renown and distinction and whatever credit inheres from so generous and

so handsome a contribution, $10,000, *but where did the $10,000 come from?* (442a)

"Did it come from Dr. Fernicola alone, *Dr. Fernicola who doesn't say so.*" (443a)

When an objection was made, the Judge (then outside the Jury's presence) overruled counsel on the ground that the remarks had reference only to what petitioner had or had not said in the tax return. The Government asserts that:

"This was what the jury thought and what the prosecutor intended." (Br. 7)

Regardless of what the prosecutor intended, the basic factor is what the Jury thought, or may reasonably have thought, he intended, and in only one instance was the remark limited to petitioner's failure to "say so" in his 1954 income tax return. *Knowles* v. *United States,* 224 F. 2d 168 (10 Cir. 1955) states that the test of improper comment and reversible error is whether the language used "was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." In the instant case, the language used was of such character and of such repetition that the Jury must necessarily have inferred that the failure of the petitioner to "say so" from the stand and under oath could be used against him in a determination of guilt.

In *Stone* v. *State,* 105 Ala. 60, 17 So. 114 (1895), defendant was being tried for arson. During the course of the prosecutor's argument to the Jury, he said: "He don't say he didn't do it." The language was held to constitute reversible error as being a com-

ment by counsel on the failure of the defendant to testify.

In *Wilson* v. *United States,* 149 U.S. 60 (1892), the prosecution stated:

> "* * * I want to say to you * * * that if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime."

This Court stated that the statement intimated to the Jury as plainly as if said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify.

Is the intimation here any less plain where, with respect to this contribution, the prosecutor repeatedly asserts that the defendant fails to say whether the contribution came from his resources? By such statement, was not the Jury's attention clearly, unmistakably and persistently called to the failure of the accused to take the stand? *Cf. Berger* v. *United States,* 295 U.S. 78, 89 (1935). Under those circumstances, the failure of the Court to cure the error by prompt instructions is ground for setting aside the conviction as a violation of petitioner's rights under the Fifth Amendment and its analog, section 3481 of Title 18, United States Code. *United States* v. *Hamilton,* 97 F. Supp. 123, 127 (D.C. W.Va. 1951); *Desmond* v. *United States,* 345 F. 2d 225, 226 (1 Cir. 1965); *United States* v. *Fay,* 349 F. 2d 957 (2 Cir. 1965); *Knowles* v. *United States, supra.* Petitioner's right in this respect is so well fixed that this Court in *Griffin* v. *California,* 380 U.S. 609 (1965) overruled, as being uncon-

stitutional, a state statute permitting comment as to the failure of the accused to testify.

Further, though the United States would reach its own favorable conclusion as to "what the Jury thought" with respect to these remarks, their natural effect was to prejudice petitioner's substantial rights so that "it must affirmatively appear from the record to be harmless in order for the conviction to be upheld." *San Fratello* v. *United States,* 340 F. 2d 560, 566 (5 Cir. 1965), citing *McCandless* v. *United States,* 298 U.S. 342, 347-348 (1935) and *Kotteakos* v. *United States,* 328 U.S. 750, 760 (1946).

Compounding the error in this respect was the prosecutor's comment on the failure of petitioner's wife to testify which the Government would brush aside with the comment: "She was not the defendant." (Br. 7)

Such position, however, is too naive. The Supreme Court has stated the "missing witness rule" to be that "If a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves* v. *United States,* 150 U.S. 118, 121 (1893). In that case, however, such rule was held not to be applicable to the wife of the accused, since he was under no obligation to produce her. It is submitted, therefore, that if no adverse presumption or inference under the "missing witness rule" can be raised with respect to the nonproduction of the wife as a witness, her failure to take the stand cannot be adversely commented on by the prosecution for, in so doing, it, in substance and effect, is asserting that the nonproduction of privileged testimony creates a presumption adverse to the accused.

An accused husband is possessed of the privilege to refuse to allow his spouse to testify against him and she also has the privilege not to testify. *Hawkins* v. *United States,* 358 U.S. 74 (1958). Where such privilege has been exercised, any principle which would permit an inference that the excluded testimony would be unfavorable to the party who suppressed it ought to yield, as being inconsistent with the full exercise of the privilege. VII, *Wigmore on Evidence,* McNaughton Revision, 1961, section 2243, page 259.

Thus, in *San Fratello* v. *United States, supra,* the Court stated the common law rule to be "that the mere fact of calling one's spouse as a witness for the prosecution in a criminal trial of the other for the purpose of forcing the claim of marital privilege against testifying is prejudicial error." If the foregoing be the law, then it is or should also be the law that the failure of the spouse to testify cannot be repeatedly drawn to the attention of the Jury by adverse comment thereon as was done by the following statements made by the prosecutor in summation:

> "* * * If he wants you to believe that Mrs. Fernicola gave the doctor one hundred and twenty-five thousand dollars, the way to prove it is from the witness stand, under oath, to *put Mrs. Fernicola on that stand,* and tell us how much she gave Dr. Fernicola, and other aspects about that gift to Dr. Fernicola. (451a)
>
> * * *
>
> "Well, if Mr. Querques wants us to believe that it was more than fifty thousand, *the way to prove it is from that witness stand,* under oath, * * *. (453a)
>
> * * *

"Now, if Mr. Querques wants us to believe that the doctor received five thousand dollars cash in wedding gifts at the time of his wedding, the way to prove it is from that witness stand, under oath. * * * *put on Mrs. Fernicola and just ask her one question * * * but that doesn't happen. That doesn't happen.* (453a-454a)

* * *

"* * * Well, if he wants us to believe that Dr. Fernicola got money from Giano Merlo, *put Mrs. Fernicola on the stand* to testify about it. * * *". (454a).

Here again, regardless of what the prosecutor intended or what the Presiding Judge thought the meaning of such comments to be, their only result was a natural and necessary inference *to a lay Jury* that the failure of petitioner and his wife to take the stand was a circumstance against the innocence of the petitioner permissibly to be taken into consideration in arriving at a verdict. So firmly was this inference established by a studied repetitiveness that its effect could not be erased by the general charge of the Court (263b) dealing only with the petitioner.

As stated by this Court in *Ullman* v. *United States,* 350 U.S. 422, 426 (1955), petitioner's constitutional protection "must not be interpreted in a hostile or niggardly spirit" and (*Kotteakos* v. *United States,* 328 U.S. 750, 754-765 (1946)) if on review of the asserted errors one is left in grave doubt, the conviction cannot stand.

3. Did the Prosecutor Practically Accuse Defense Counsel of Suborning Perjury in Connection With the Testimony About the Cash Hoard and Assert His Personal Belief in the Falsity of That Testimony?

Without direct reference to the portions of the prosecution's summation here complained of by petitioner, the Government states (Br. 8) that "doubtless a certain amount of acrimony did creep into this trial;" that "at one point in the trial petitioner's counsel had to be reprimanded by the Judge, outside the Jury's presence, for virtually accusing the prosecutor of lying" (R. 493a-494a); and that it "is in this setting" [all of *which*, petitioner stresses, concurred *after* summation] that the prosecutor's remarks in summation must be considered.

The Government then attempts to distinguish *Berger* v. *United States,* 295 U.S. 78 (1935) and relies upon *Lawn* v. *United States,* 355 U.S. 339 (1958) where the prosecution's statement involved was that "we vouch for" certain government witnesses "because we think they are telling the truth" which was invited by defense counsel's summation referring to the witnesses as "admitted perjurers." The Court, in overruling the taxpayer's contention, stated that the "Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the Jury."

Contrast this with prosecution's summation herein wherein defense counsel was accused of "contriving" the defense of a cash hoard. The heart of the comment was as follows:

> "* * * *Mr. Querques comes into the case in September* of this year. The case is put down

for trial. He gets a copy of the indictment, and any trial lawyer reading that indictment is going to see from the indictment that the magic number is seventy-five thousand dollars. *Any lawyer taking this case to trial has got to come up with seventy-five thousand dollars of a cash hoard prior to that first tax year, to beat the case,* so the quest goes on for seventy-five thousand dollars of nontaxable income, nontaxable funds to explain the discrepancy, to explain away all these cash expenditures * * *. (471a)

* * *

"Isn't this a last-ditch stand? *Isn't this a defense contrived for trial—and yes—I'll use the term. Isn't this manufactured evidence?* * * *" (473a)

Since there was direct testimony presented as to the existence of this cash hoard, these comments amounted to no less than an accusation that defense counsel had suborned perjury.

Thus the situation is indistinguishable from *Weathers* v. *United States,* 117 F. 2d 585, 586 (5 Cir. 1941) where the prosecuting attorney, commenting on the testimony of a government witness, stated that "It was plain to be seen that the defendant or defendant's counsel or somebody, had gotten to this woman before she was called to testify." With respect thereto, the Court stated as follows:

"The court did not reprimand the attorney for this line of argument or direct the jury to disregard it. Moreover, he did not comment upon it in his charge. The full force of this argument was left with the jury. It carried the imputation and inference that the defendant and his counsel had been guilty of reprehensible conduct by influencing the witness, Mrs. Weathers, to give false

testimony. Furthermore, the jury might have concluded from this argument that counsel for the defendant had been guilty of conduct so reprehensible as to make the argument for the defendant unworthy of consideration and belief. We are of the opinion that it was calculated to, and did, prejudice the rights of the defendant before the jury. It was the duty of the trial court to have promptly excluded this improper argument and directed the jury not to consider it. Failing in this the court committed prejudicial error. *Berger* v. *United States,* 295 U.S. 78 * * *."

It is submitted that the statement involved herein also carried the imputation and inference that defense counsel had been guilty of reprehensible conduct by submitting "manufactured evidence"—to the prejudice of the rights of the defendant before the Jury.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully prays that this Court rehear and reverse its October 10 decision to deny certiorari in this case. Counsel for petitioner is well aware of the stringent requirements of this Court's Rule 58 and desires to assure the Court that he resorts to requesting the extraordinary relief of rehearing only after careful deliberation. Counsel for petitioner believes that such rehearing is merited in this case first, in order to avoid a grave miscarriage of justice as to this petitioner, and second, because this Court has granted certiorari in the case of *Ruth Elizabeth Chapman and Thomas LeRoy Teale* v. *California,* No. 95, O.T. 1966

(Brief for Petitioners filed August 16, 1966),[1] a case involving the same question as presented in petitioner's petition, *viz.*, the constitutional propriety of comments by the prosecutor upon the defendant's exercise of his Fifth Amendment privilege to refrain from taking the stand. Moreover, this same question is presented in varying forms in two other petitions presently under consideration by this Court, *In the Matter of Kenneth Reynolds Wheaton,* No. 46, O.T. 1966 (No. 853, O.T. 1965, filed Dec. 28, 1965; renumbered 46, O.T. 1966), and *Vincent Pacelli* v. *United States,* No. 527, O.T. 1966 (filed September 6, 1966). Petitioner respectfully submits that his petition for rehearing should be granted so that this Court might utilize these cases as a vehicle for broad and comprehensive consideration of the implementation of the rule announced in *Griffin* v. *California,* 380 U.S. 609.

In *Chapman, supra,* this Court has under consideration the question of whether a violation of the rule announced in *Griffin* can ever be "harmless." Although the prosecutor's summation references to the defendants' failure to take the stand in *Chapman* are extremely blatant and fairly permeate the record, petitioner submits that the prejudice caused to him in the instant case was no less, just because the Assistant United States Attorney's comments were less direct

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[1] This case was numbered 875 Misc. in the 1965 Term. Certiorari was granted on March 26, 1966, the order stating: "The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is also granted limited to the following questions: 'Where there is a violation of Griffin v. California, 380 U.S. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?' The case is transferred to the appellate docket. The Chief Justice took no part in the consideration or decision of this petition."

and more subtle than in *Chapman*. This is readily seen from a comparison of some of the prejudicial summation statements in *Chapman* with the prejudicial summation statements in the instant case. For example, the prosecutor in *Chapman* stated to the jury, *inter alia:*

> "... but in their best judgment they didn't choose to get up and tell you about it, [a fact] which you certainly can consider ..." (Pet. Br., p. 16).
>
> "... the fact that they chose to rest upon whatever evidence there is in the case in chief is something that you can consider in deciding whether or not they have been fair with you." *Ibid.*
>
> "This is the chance that they take by not having taken the stand." *Ibid.*
>
> "... but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all." *Id.* at 20.
>
> "... Mr. Teale has never taken the stand in this case and testified for you." *Id.* at 23.
>
> "The only individuals that could give you that information would be the defendants, either one or both of them, ... And of course you know that you have not heard from them." *Id.* at 25.
>
> "Only two people know. They didn't tell you. That is the way they want to proceed." *Id.* at 36.
>
> "So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity." *Id.* at 93.

> ". . . who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is [the defendant] . . ." *Id.* at 97.
>
> "Once again, Mrs. Chapman did not take the stand and explain these things and tell us about them as she could have." *Id.* at 101.

In the petition in the instant case, the second question presented was posed thusly:

> "2. Was not petitioner's right to be free of adverse inferences on his failure to testify violated where government counsel, in summation, made reference to the fact that petitioner's wife did not take the stand, and indirect references to petitioner's failure to testify?" (Pet., p. 2)

The question derived from these facts: the case against petitioner, a doctor, was for income tax evasion. The government attempted to prove its case by the "net worth" method (*Holland* v. *United States,* 348 U.S. 121 (1954)). Neither petitioner nor his wife (who had signed the returns in question, but who was not a defendant) took the stand. In his summation to the jury, the prosecutor referred repeatedly to petitioner's *failure to explain* a contribution that he had made to a church, thereby implying that petitioner had something to hide by not testifying. In addition, there were numerous direct and explicit comments concerning the failure of petitioner's wife to testify. The comments as to petitioner were as follows:

> ". . . *Who says* the money came from Dr. Fernicola's resources?" (438a)
>
> ". . . The only evidence we received was the evidence of a receipt of $10,000 turned over by [Dr. Fernicola to the church] . . ." (439a)

"... And in referring to some of these documents *who says* that the $10,000 came from funds of Dr. Fernicola? Referring to Dr. Fernicola's 1954 income tax return, *he didn't say so* ..." (439a)

"*Who says* the money came from Dr. Fernicola's own resources, *not Dr. Fernicola.* Well, if that $10,000 didn't come out of the pocket of Dr. Fernicola, where did it come from? And in that regard I want to call attention to the receipt printed right at the bottom of it, 'contributions deductible for income tax purposes,' and they are and should be, *but Dr. Fernicola doesn't say so.*" (440a)

"... but where did the $10,000 come from? ... Did it come from Dr. Fernicola alone, *Dr. Fernicola doesn't say so.*" (442-43a) (Emphasis added.)

Petitioner's counsel objected that the prosecutor was commenting upon petitioner's failure to take the stand. The judge overruled counsel on the ground that the remarks had reference only to what petitioner had or had not said in the tax return.

Shortly after the above comments, the prosecutor commented upon the failure of petitioner's wife to take the stand in the following words:

"... If [defense counsel] wants you to believe that Mrs. Fernicola gave the doctor one hundred and twenty-five thousand dollars, *the way to prove it is from the witness stand,* under oath, *to put Mrs. Fernicola on that stand,* and tell us how much she gave Dr. Fernicola, and other aspects about that gift to Dr. Fernicola. (451a)

"Well, if [defense counsel] wants us to believe that it was more than fifty thousand, *the way to prove it is from that witness stand,* under oath, ... (453a)

"Now, if [defense counsel] wants us to believe that the doctor received five thousand dollars cash in